IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.194 of 1999
With
CRIMINAL APPEAL No.195 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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STATE OF GUJARAT - Appellant

Versus

MOHMED SALIM ABUBAKKAR & OTHERS - Respondents

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Appearance :
Criminal Appeal No.194 of 1999.
MR KT DAVE, APP for Appellant.
MR MANISH M BUDHDHBHATTI for Respondent Nos.1 & 5
Respondent No.2 – Died.
MR ND BUCH for M/S. NANAVATY ADVOCATES for Respondent No.3.
MR MEHUL SHARAD SHAH for Respondent No.4.
MS KRUTI M SHAH with MR MP SHAH for Respondent No.6.
Criminal Appeal No.195 of 1999.
MR KT DAVE, APP for Appellant.
MR MANISH M BUDHDHBHATTI for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 23/11/2005

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Abovenumbered two appeals filed by the State of Gujarat under Section 378 of the Code of Criminal

Procedure, 1973, are directed against common judgment dated December 11, 1998 rendered by the learned Special Judge, Kutch at Bhuj, in Special Case No.74 of 1992 and Special Case No.2 of 1993 by which six respondents in Criminal Appeal No. 194 of 1999, who were original accused Nos.1 to 6 in Special Case No.74 of 1992, and sole respondent in Criminal Appeal no.195 of 1999, who was sole accused in Special Case No.2 of 1993, are acquitted of the offences punishable under Sections 20(b) & 23 r.w. Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act” for short).

2. The facts emerging from the record of the case are as under :

Mr.L.S.Pargi, who was then Circle Police Inspector (`CPI' for short), Nalia Division, District : Kutch, received a wireless-message on May 5, 1992 from Police Jamadar Muljibhai P.Parmar of Jakhau Police Station informing him that at the house of Adha Mamad Darad situated in village Rapar-Gadhvali, persons belonging to Pakistan were present and they had concealed narcotic substance in thickets located in the sim of the village. On receipt of information, Mr.Pargi, in the company of Mr.S.M.Patil, Police Sub Inspector and other police personnel of Nalia Police Station, proceeded towards Jakhau Police Station in a Government vehicle. On

way to Jakhau Police Station, Mr.Pargi conveyed the information to District Superintendent of Police, Kutch-Bhuj and requested him to be at village Rapar-Gadhvali. After reaching Jakhau Police Station, Mr.Pargi verified the information, which was conveyed to him by Police Jamadar Muljibhai P.Parmar. Police Jamandar Muljibhai Parmar produced his informer before Mr.Pargi and from informer also, Mr.Pargi learnt that Pakistani nationals were present in the house of Adha Mamad Darad situated in village Rapar-Gadhvali, and that they had concealed narcotic substance in the thickets naturally grown in the sim of village Rapar-Gadhvali. After verifying the information, C.P.I. Mr.Pargi, with police personnel who had accompanied him from Nalia Police Station as well as personnel of Jakhau Police Station, proceeded to reach village Rapar-Gadhvali in two separate vehicles. At a place between Vanku village and Rapar-Gadhvali, the vehicles were halted where C.P.I. Mr. Pargi waited for D.S.P. to come. After waiting for about half an hour, he deputed Head Constable Muljibhai P.Parmar to requisition services of two panch witnesses. Accordingly, services of two panch witnesses namely (1) Umar Meraman Khod, and (2) Sidiq Ala were requisitioned. Five minutes before arrival of panch witnesses, D.S.P. Bhuj arrived and under the leadership of D.S.P.Bhuj, all proceeded towards Rapar-Gadhvali village. The Government vehicles were halted near the plain at the extremity of the village.

Thereafter, all proceeded towards the house of Adha Mamad on foot. On sighting police, one person started shouting “police, police” and, therefore, five persons came out of the house of Adha Mamad in a huff and started running away. They were chased and three persons were arrested on the spot. They were (1) Jahangirsha Navalsha Saiyed of village Arikhana, Taluka Abdasa, who was residing at Karanchi-Pakistan i.e. the respondent No. 4 in Criminal Appeal No. 194 of 1999, (2) Mohmad Husen Haji Abdrema of Golachi Sindh Pakistan i.e. the respondent No. 2 in Criminal Appeal No. 194 of 1999, and (3) Harun Kasam Sonara of village Suthari. On interrogation, Jahangirsha informed the police officials that since two years he was staying in Pakistan, and the quantity of charas was brought from Karanchi to be delivered to one Salim Memon of Mumbai i.e. the respondent No. 3 in Criminal Appeal No. 194 of 1999 and Harun Umar Memon of Karanchi, who had put up at Musafarkhana, Bhuj. Thereupon, D.S.P.Bhuj flashed wireless-message to Dy.S.P. Mr.Bhatt and asked him to make necessary investigation at Musafarkhana, Bhuj. The personal search of three accused apprehended resulted into find of certain articles like packet of capstan cigarette manufactured in Pakistan etc. In the presence of panch witnesses, house of Adha Mamad was also searched, but, nothing incriminating was found. On further interrogation by D.S.P. Mr.Jha, accused Jahangirsha Saiyed informed that he and Mohmad Husen had

brought quantity of charas in a mechanized boat belonging to Mohmad Faruq Haji Umar of Karanchi i.e. the respondent No. 3 in Criminal Appeal No. 194 of 1999 in ten plastic Cans and that those plastic Cans were concealed in the thickets located between the sim of village Singhodi and village Rapar-Gadhvali near seashore. It was also informed by Jahangirsha Saiyed that sailors, who were serving on mechanized boat, had gone back to Karanchi after unloading quantity of charas. It was further informed by Jahangirsha Saiyed that one Umar Jusab Gajan i.e. the sole respondent in Criminal Appeal No. 195 of 1999 had delivered samples of charas to Mohmad Faruq and Salim Abubakar of Mumbai in Ambassador Car bearing Registration No.GJ-12-9784. In the presence of panch witnesses, accused Jahangirsha Saiyed and Mohmad Husen Haji Abdrema made disclosure statements, pursuant to which, in all ten plastic Cans containing charas were recovered from the thickets which had grown in the common sim of village Singhodi and Rapar-Gadhvali. It may be stated that raid was carried out during night hours and as there was complete darkness at the place from-where tins were recovered, it was not possible to undertake seizure procedure. Therefore, the tins and the three accused were brought in the Office of D.S.P.Bhuj Via.Kothara Police Station. At the office of D.S.P.Bhuj, necessary samples were drawn. As the three accused could not produce pass or permit authorising them to possess

charas, they were apprehended. The charas found at the instance of Jahangirsha Saiyed and Mohmad Husen Haji Abdrema was weighed by a policeman and its weight was found to be 255 Kilograms and 346 Grams. From the quantity of charas seized, necessary samples were drawn and sealed. Further interrogation of Jahangirsha Saiyed and Mohmad Haji Abdrema revealed that a conspiracy was hatched and others had also abetted them in bringing charas from Karanchi. Therefore, Mr.L.S.Pargi, the then C.P.I. Nalia Division, District : Kutch lodged his complaint at Jakhau Police Station. After registering offences against the three arrested accused and others, the complaint of Mr.Pargi was handed over to him for further investigation. During investigation, it was learnt that the mastermind of operation was Mohmad Faruq Haji Umar Memon of Karanchi as well as Salim Abubakar Memon of Mumbai, who had conspired and abetted with the arrested accused to bring large quantity of charas from Karanchi to India. Therefore, they were arrested. Further, Adha Mamad Darad, at whose place the Pakistanis had assembled, was also arrested. The samples drawn were sent to F.S.L. for analysis. The report of analysis indicated that the substance analysed was charas within the meaning of the Act. On conclusion of investigation, six respondents in Criminal Appeal No.194 of 1999 and absconding accused Nilkund @ Yusuf Abubakar were chargesheeted in the Court of learned Special Judge,

Kutch at Bhuj, on the basis of which Special Case No.74 of 1992 was registered against them. Further investigation of the case revealed that the fifth person, who was able to make his escape good when house of Adha Mamad Darad was raided, was the sole respondent in Criminal Appeal No.195 of 1999. Therefore, he was also arrested and on completion of investigation against him, he was also chargesheeted in the Court of learned Special Judge Kutch at Bhuj, on the basis of which Special Case No.2 of 1993 was registered against him.

3. The learned Special Judge framed necessary charge at Exh.39-C in Special Case No.74 of 1992 against seven accused, and charge at Exh.8 against sole accused in Special Case No.2 of 1993. It may be stated that original accused No.7 is absconding and, therefore, trial against him was separated and others were prosecuted. Two different charges framed in two different Special Cases were read over and explained to the respective accused. They pleaded not guilty to the same and claimed to be tried. There are two different sessions cases which were consolidated and common evidence was led in Sessions Case No. 74 of 1992. The prosecution examined (1) panch Umar Meraman Khod as PW.1 at Exh.50, (2) panch Ishwarbharti Umarbharti as PW.2 at Exh.54, (3) panch Jentibhai Pragji Bhanshali as PW.3 at Exh.55, (4) panch Laghubhai Nathubhai Shah as PW.4 at

Exh.58, (5) panch Rajendragar Shankergar as PW.5 at Exh.59,(6) Senior Police Jamadar Muljibhai Punaji Parmar as PW.6 at Exh.60; (7) Head Constable Jamnadas Kunvarji Bhanusahi as PW.7 at Exh.71; (8) Tailor Bhagwanji Bhimji Solanki as PW.8 at Exh.72; (9) Head Constable Shivdayal Khubram Yadav as PW.9 at Exh.73; (10) Head Constable Harishchandra Ichchharam Trivedi as PW.11 at Exh.74; (11) Talati-cum-Mantri Tershibhai Pratapbhai Rathod as PW.11 at Exh.75; (12) Assistant in F.S.L. Manohar Narayan Madankar as PW.12 at Exh.81; (13) Senior Scientific Officer Atmaram Ratilal Ranpura as PW.13 at Exh.83; (14) Senior Clerk in Office of TDO Hirachand Veljibhai Shah as PW.14 at Exh.85; (15) Police Constable Maliram Baluram as PW.15 at Exh.89; (16) PSI Suresh Madhavrav Patil as PW.16 at Exh.98; and, (17) Circle Police Inspector Laljibhai Shamjibhai Pargi as PW.17 at Exh.102, to prove its case against the accused. The prosecution also produced documentary evidence, such as panchnama of search of persons of (1) Jahangirsha Saiyed, (2) Mohmad Husen Haji Abdreman and (3) Harun Kasam as well as recovery of ten Cans of charas from the sim of village Singhodi pursuant to disclosure statements made by Jahangirsha Saiyed and Mohmad Husen Haji Abdrema at Exh.51, panchnama of seizure of capstan cigarettes at Exh.52, panchnama of seizure of currency notes at Exh.56, certificate indicating that boundary of village Rampargadh and Singhodi is common at Exh.76, panchnama of

search of house of accused No.5 at Exh.99, complaint lodged by Mr.Pargi at Exh.103; panchnama of search of car at Exh.104, report of analysis at Exh.111, panchnama of place belonging to accused No.1 at Mumbai, etc. in support of its case against the accused.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973, wherein each accused denied the case of the prosecution and claimed that a false case was foisted upon him. However, no defence evidence was adduced by any of the accused.

5. On appreciation of evidence led by the prosecution, the learned Judge held that before search and seizure of contraband charas, mandatory provisions of Sections 41(2) and 42(2) of the Act were not complied with. The learned Judge noticed that the complaint, which was lodged by Mr.Pargi, was investigated by himself, and held that recovery of large quantity of charas was in great doubt. According to the learned Judge, no independent panch witnesses were kept present at the time when charas was recovered and recovery of charas pursuant to disclosure statements made by accused Jahangirsha

Saiyed and accused Abdrema was doubtful, and it was not proved satisfactorily by the prosecution that the accused were in conscious possession of contraband substance. The learned Judge noticed that though the recovery of contraband substance was over in the early morning of May 6, 1992, the complaint was lodged on May 7, 1992, whereas report as contemplated by Section 157 of the Code of Criminal Procedure, 1973 was forwarded to the learned Magistrate on May 8, 1992, and as delay in filing complaint was not explained, manipulation against the accused was not ruled out. The learned Judge came to the conclusion that the provisions of Sections 52 & 57 of the Act as well as Section 102(3) of the Code of Criminal Procedure, 1973 were not complied with, nor evidence was adduced to establish that muddamal was kept in safe-custody from May 5, 1992 till it was despatched to Forensic Science Laboratory on May 8, 1992 and, therefore, possibility of tampering with the same was not ruled out. In view of abovereferredto conclusions, the learned Judge has acquitted the respondents in both the appeals by common judgment dated December 11, 1998, giving rise to abovenumbered two appeals.

6. The record of Criminal Appeal No.194 of 1999 indicates that the appeal was admitted by Division Bench comprising M.R.Calla & M.C.Patel, JJ., vide order dated December 16, 1999 and it was ordered to issue bailable

warrant in the sum of Rs.2000/- against each respondent. When abovequoted order was passed, the respondent No.2 i.e. Mohmad Husen Haji Abdrema was in judicial custody with reference to case registered against him for commission of offences punishable under Sections 13(2) & 14 of the Foreigners Act read with Rules 3 & 6 of the Indian Passport Rules, which was then pending in the Court of learned Judicial Magistrate, First Class, Nalia, Kutch-Bhuj. The jail-remarks-sheet of the respondent No.2 produced by the learned Additional Public Prosecutor indicates that the respondent No.2 was convicted vide judgment dated October 9, 2001, rendered by the learned J.M.F.C. Nalia, Kutch-Bhuj for commission of above mentioned offences. Mr.K.T.Dave, learned A.P.P. for the State states that while undergoing sentence in above mentioned case, the respondent No.2 expired on December 8, 2001. In support of this claim, the learned A.P.P. has produced jail-remarks-sheet which indicates that the respondent No.2 expired in Civil Hospital, Ahmedabad on December 8, 2001 after prolonged illness. The learned A.P.P. has also produced xerox copy of certificate issued by Medical Officer, Civil Hospital, Ahmedabad, which shows that postmortem examination of dead body of the respondent No.2, who was then aged 80 years, was performed by a panel of doctors on December 9, 2001. The two documents produced by the learned A.P.P. for the State are ordered to be taken on record of

Criminal Appeal No. 194 of 1999. There is no manner of doubt that the respondent No.2 has expired during the pendency of Criminal Appeal No.194 of 1999. Section 394 of the Code of Criminal Procedure, 1973, inter alia, provides that every appeal under Section 377 or Section 378 shall finally abate on the death of the accused. This is an appeal filed under Section 378 of the Code and, therefore, the same will have to be treated as having finally abated as far as the respondent No.2 is concerned, as he expired on December 8, 2001 during the pendency of the appeal. Accordingly, it is held that appeal against the respondent No.2 has finally abated on his death. The record further shows that the respondents No.1 & 5 in Criminal Appeal No.194 of 1999 and sole respondent in Criminal Appeal No.195 of 1999 are served, but, they have neither appeared in person nor made arrangement for their appearance through a lawyer. Having regard to the facts of the case, this Court was of the opinion that an advocate should be appointed to render legal assistance to those served respondents and, therefore, Mr.Manish M.Buddhbhatti, learned advocate practising in this Court was appointed to render legal assistance to the respondents No.1 & 5 in Criminal Appeal No.194 of 1999 and sole respondent in Criminal Appeal No.195 of 1999. Accordingly, Mr. Buddhbhatti, learned Advocate, has rendered competent legal assistance to those served respondents.

7. This Court has heard Mr.K.T.Dave, learned A.P.P., for the State as well as Mr.Manish M.Budhdhbhatti, learned counsel of the respondent Nos.1 & 5 in Criminal Appeal No.194 of 1999 as well as sole respondent in Criminal Appeal No.195 of 1999 and Mr.Nirad D.Buch, learned advocate appearing for M/s. Nanavaty Advocates, who represent the respondent No.3 in Criminal Appeal No.194 of 1999 and Mr.Mehul Sharad Shah, learned counsel appearing for the respondent No.4 in Criminal Appeal No.194 of 1999 as well as Ms.Kruti M.Shah, learned advocate with Mr.M.P.Shah, learned counsel appearing for the respondent No.6 in Criminal Appeal No.194 of 1999, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The case of the prosecution is that when the house of Adha Mamad Darad situated in village Rapar-Gadhvali was raided , three persons i.e. respondent No.2 & respondent No.4 in Criminal Appeal No.194 of 1999 as well as Harun Kasam, who was discharged by the learned Special Judge, were apprehended from the spot; whereas two other accused i.e. respondent No.5 in Criminal Appeal No.194 of 1999 and the sole respondent in Criminal Appeal

No.195 of 1999 were later on apprehended and identified by the prosecution witnesses. The prosecution case was that parcel of charas was delivered by the sole respondent in Criminal Appeal No.195 of 1999 and the quantity of charas concealed was to be delivered to respondent No.1 in Criminal Appeal No.194 of 1999. It was also the case of the prosecution that pursuant to message sent by D.S.P. Kutch-Bhuj, the respondents No.1 & 3 in Criminal Appeal No.194 of 1999 were apprehended from Musafirkhana, Bhuj. However, no reliable evidence could be produced by the prosecution to establish that the respondents No.2 & 4 were abated by other respondents for commission of offences punishable under the Act, nor any trustworthy evidence could be laid before the Court to establish that all the respondents were party to a criminal conspiracy to commit offences punishable under the Act. A person abets the doing of a thing, who-First-Instigates any person to do that thing, or Secondly-Engages with one or more other persons, or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or Thirdly-Intentionally aids, by any act or illegal omission, the doing of that thing. No evidence is adduced by the prosecution to establish that the respondent Nos.2 & 4 were instigated by rest of the respondents for commission of offences punishable under the Act, or

except respondent Nos.2 & 4, others had engaged with each other in any conspiracy for commission of the offences punishable under the Act, or had intentionally aided, by any act or illegal omission, the commission of offences punishable under the Act. Therefore, the learned Judge of the trial Court was justified in coming to the conclusion that no reliable evidence was adduced by the prosecution to establish charge under Section 29 of the Act against the respondents. Similarly, no evidence could be adduced by the prosecution to establish that two or more respondents had agreed to do or caused to be done an illegal act or an act which was not illegal by illegal means. Therefore, acquittal of rest of the respondents, except the respondent Nos.2 & 4, for commission of offences punishable under Sections 20 (b) and 23 read with Section 29 of the Act cannot be regarded as erroneous so as to call for interference of this Court in instant appeals.

9. In the alternative, this Court finds that as observed earlier, initially information that certain Pakistani nationals had collected at the house of Adha Mamad Darad situated in village Rapar-Gadhavali, was received by Police Jamadar Muljibhai P.Parmar of Jakhau Police Station. He, in turn, conveyed the information to Mr.L.S.Pargi, who was then Circle Police Inspector. Mr.Pargi thereupon proceeded to Jakhau Police Station in

a Government vehicle along with police officials. On way to Jakhau Police Station, he conveyed the information/message to the D.S.P. Kutch-Bhuj and requested him to be at village Rapar-Gadhvali. After reaching Jakhau Police Station, Mr.Pargi verified the information which was conveyed to him by Police Jamadar Muljibhai Parmar. The Police Jamadar Muljibhai parmar produced his informer before Mr.Pargi and from the informer also, Mr.Pargi learnt that Pakistani nationals had collected in the house of Adha Mamad Darad situated in village Rapar-Gadhvali and that they had concealed narcotic substance in thickets located in the sim of village Rapar-Gadhvali. The record shows that C.P.I. Mr.Pargi was in charge of four Police Stations viz.(1) Nalia, (2) Jakhau, (3) Kothara, and (4) Vayor. In exercise of powers conferred by sub-section(2) of Section 41 of the Narcotic Drugs and Psychotropic Substances Act, 1985, the Government of Gujarat has, inter alia, empowered all police officers, of the police department, of above rank of Inspector of Police, posted in any part of State of Gujarat for the purpose of sub-section (2) vide Notification No.GH-L.14-NDS-1087(i)-M, dated 15th June, 1987. Therefore, C.P.I. Mr.Pargi was an empowered officer within the meaning of Section 41(2) of the Act. He is also an officer of a gazetted rank of the police department. Therefore, it was obligatory for him to comply with the provisions of Section 41(2) of the Act.

Section 41(2) of the Act, inter alia, contemplates that when an information is received by an officer of a gazetted rank, who is empowered under sub-section (2) of Section 41 of the Act, he should reduce the information into writing. The record of the case nowhere indicates that the information received by C.P.I. Mr.Pargi from Police Jamadar Muljibhai P.Parmar of Jakhau Police Station was reduced into writing, nor the record indicates that the information which was verified personally by C.P.I. Mr.Pargi from the informer of Police Jamadar Muljibhai P.Parmar of Jakhau Police Station was reduced into writing. Therefore, there is no manner of doubt that the provisions of Section 41(2) of the Act were not complied with by C.P.I. Mr.Pargi. This lapse on the part of C.P.I. Mr.Pargi will have to be regarded as fatal to the prosecution.

10. Further, on re-examination of testimony of (1) Senior Police Jamadar Muljibhai Punaji Parmar recorded at Exh.60, (2) Head Constable Jamnadas Kunverji Bhanushali recorded at Exh.71, (3) Head Constable Shivdayal Khubram Yadav recorded at Exh.73, (4) Head Constable Harishchandra Ichchharam Trivedi recorded at Exh.74, (5) Police Constable Maliram Baluram recorded at Exh.89, (6) P.S.I. Sureshbhai Madhavrao Patil recorded at Exh.98, and (7) C.P.I. Mr.L.S.Pargi recorded at Exh.102, read with contents of panchnama Exh.51, it becomes evident that

from each Can, several plastic packets containing charas were recovered, and in all, six samples were drawn to be forwarded to F.S.L. Paragraph-5 of testimony of witness Maliram Baluram recorded at Exh.89 would show that he was handed over six covers containing samples to be forwarded to F.S.L. for analysis. However, the report of analysis produced by the prosecution at Exh.111 makes it very clear that only two covers containing samples were received by F.S.L. The prosecution has not explained as to where four other covers containing samples had gone, or why those four other covers containing samples were not despatched to F.S.L. What is relevant to notice is that in the report of F.S.L. produced at Exh.111, it is mentioned that two light-green coloured covers bearing ink stamp seals were received by F.S.L. which were marked as `S-1/A and S-2/A. No prosecution witness, examined in this case, has stated that samples which were drawn and sealed in brown coloured envelopes were placed in light-green coloured covers bearing ink stamp seals. It is not the case of the prosecution that after samples were packed in brown coloured envelopes and sealed, they were placed into light-green coloured covers bearing ink stamp seal. The report of the analysis further shows that on opening the light-green coloured envelope, which was marked as `S-1/A', it was found to be containing (1) khakhi coloured envelope marked as S-1/A, on which seal of `District Superintendent of Police, Kutch-Bhuj' was

applied, and (2) letter signed by Mr.L.S.Pargi, C.P.I. Nalia, Kutch-Bhuj, dated May 8, 1992. Neither Mr.Pargi, nor any of the police officials examined in the case has stated that in the light-green coloured envelope, any letter signed by Mr.L.S.Pargi, who was then C.P.I., was placed. Thus, the contents of report of F.S.L. produced by the prosecution at Exh.111 are not in consonance with the oral evidence adduced by police officials examined in the case and raise serious doubt about the claim made by police official that the samples drawn were packed in brown coloured envelopes and after sending them, they were despatched to FSL for analysis.

11. The above mentioned deficiencies in evidence led by the prosecution will have to be viewed with another glaring fact which shows that the samples were not kept in safe-custody and that possibility of tampering with the same was not ruled out. As noted earlier, the case of the prosecution is that seizure of large quantity of charas was effected on May 5, 1992, whereas procedure of drawing panchnama was completed at about 22.05 hours on May 6, 1992. No satisfactory evidence is adduced by the prosecution to show as to how the samples drawn were thereafter dealt with. It is not mentioned by the police officials examined in the case that after the samples were handed over at the police station, the same were kept in safe-custody. It may be mentioned that on May 8,

1992, police constable Maliram took the samples to F.S.L. for analysis. As the prosecution has failed to establish that from May 6, 1992 to May 8, 1992, the samples were kept in safe-custody before they were despatched to F.S.L. for analysis, this Court is of the opinion that the trial Court was justified in recording a finding that possibility of tampering with samples was not ruled out. This Court further finds that this is not a case wherein mere possibility of tampering with the samples is probabilised by the defence, but, this probability will have to be considered in the light of the fact that six samples, which were meant for F.S.L., did not reach F.S.L., but, only two samples which were kept in light-green coloured covers having ink stamp seal reached F.S.L. Therefore, the possibility of tampering with the muddamal assumes its own importance in the facts of the case.

12. Moreover, the seizure of charas was effected on May 5, 1992 and was completed by about 18.15 hours, whereas drawing of panchnama was over at about 22.05 hours on May 6, 1992, but, complaint in the case was lodged by C.P.I. Mr.Pargi on May 7, 1992 at 13.00 hours and necessary report was forwarded to the learned Magistrate as required by Section 157 of the Code of Criminal Procedure, 1973 on May 8, 1992. There is no manner of doubt that there is delay in lodging complaint.

Delay in lodging complaint by itself may not be fatal to the prosecution, but, it is the duty of the prosecution to explain the delay caused in filing complaint. If it is not explained, the Court may be tempted to come to the conclusion that the defence that a false case was foisted upon the accused is probabilised. On the facts of the case, this Court finds that delay in lodging complaint is not explained at all by any of the prosecution witnesses and delay has adverse effect on the prosecution case if the same is viewed in the light of deficiencies in prosecution case which are noticed earlier. Reading of testimony of police officials creates an impression that they have deposed before the Court in a cursory and casual manner. Better evidence could have been produced by the prosecution by examining all those who had participated in raiding the house of Adha Mamad Darad situated in village Rapar-Gadhvali as well as search and seizure of large quantity of charas from the sim of village Singhodi. However, no such attempt was made by the prosecution.

13. These are acquittal appeals in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence

has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of **(1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhari, AIR 1967 SC 1124, and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.** On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, the appeals are liable to be dismissed.

For the foregoing reasons, both the appeals fail and are dismissed. It may be mentioned that pursuant to bailable warrant issued against the respondent No.3 in

Criminal Appeal No.194 of 1999, the respondent No.3 is in jail, as he could not furnish bail to the satisfaction of the Court. The appellant-State is directed to release the respondent No.3 from custody, unless his presence in jail is needed with reference to any other case. As one of the accused is absconding, muddamal be preserved as directed by the learned Judge of the trial Court in the impugned judgment so that trial, which may take place against him on his arrest may not become infructuous.

[J.M.PANCHAL,J.]

[H.B.ANTANI, J.]

(patel)